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The British School of Kuala Lumpur Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors (No 1)

B

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO 25–77–12 OF 2013
AZIMAH OMAR JC
7 JULY 2015

C

Labour Law — Industrial Court — Reference by Minister — Employer applied to quash decision of Minister for Human Resources to refer to IC for adjudication ex-employee's claim she unfairly dismissed — Whether factual matrix showed employee never threatened or given ultimatum to resign but that she resigned D *voluntarily — Whether employer's evidence detailing events leading up to employee's resignation unchallenged by latter even at conciliatory meetings at Industrial Relations Department — Whether Minister when exercising discretion to refer matter to IC had no material before him to say employee was dismissed — Whether Minister considered irrelevant facts and not considered relevant facts* E *in coming to decision — Whether Minister's decision went against policy of Industrial Relations Act 1967 that promoted settlement of employer-employee disputes*

The third respondent ('R3') was employed as a nursery teacher with the F applicant. Owing to growing concerns over her poor work performance – especially her coming to work late, leaving work earlier than scheduled times, being absent without reason and complaints from parents over the way she handled children – the applicant held a meeting with R3 on 15 February 2013 (a Friday) where she was told she had the option to 'shape up' and continue in G employment and risk facing disciplinary action if future instances of misconduct occurred or voluntarily resign and obtain the benefits that came with it if she could not promise to duly perform her obligations under her contract. R3, who at the time was looking after her ailing husband, was given the weekend to consider the options and come to a decision by the following H Monday. Even before the meeting started on 18 February 2013, R3 informed the applicant that she had already sent an email stating that she had decided to resign from her employment with immediate effect. On the same day, the applicant drafted a resignation letter which R3 read and signed. She was paid her salary till end of March 2013 and was promised two business-class one-way I air tickets to a destination of choice. Ten days after she had signed the resignation letter, R3 wrote to the applicant contending that she had been dismissed from employment; that she was told that if she did not sign the resignation letter her services would be terminated. R3 filed representations with the Industrial Relations Department seeking reinstatement to her former

job with full salary and benefits. After conciliatory meetings were held at the Industrial Relations Department where both parties had the opportunity to fully state their respective cases, the matter was referred to the first respondent, ie the Minister for Human Resources ('the Minister') who, in exercise of his discretion under s 20(3) of the Industrial Relations Act 1967 ('the IRA') referred R3's representations to the Industrial Court for adjudication. In the instant judicial review application, the applicant sought an order of certiorari to quash the Minister's reference arguing that he had misdirected himself in coming to that decision as he had: (a) failed to consider facts he ought to have considered and considered matters he ought not to have considered; and (b) failed to appreciate that the applicant and R3 had achieved a mutual settlement which included a voluntary resignation by R3 and, therefore, there was no dispute in fact or law that required the adjudication of the Industrial Court.

Held, quashing the first respondent's reference to the Industrial Court:

(1) There was overwhelming evidence the Minister had not properly appreciated the factual matrix of the case and had misdirected himself in exercising his discretion in that he had not considered facts which he ought to have considered and vice versa. He had, in the face of a clear settlement, contradicted the object, purpose and policy of the IRA and had failed to apply proper rules of law in determining the validity of R3's voluntary resignation. The applicant had successfully proven that the Minister had committed errors of law in arriving at his decision to refer R3's representation to the Industrial Court (see paras 58–60).

(2) The Minister in his affidavit in reply had misdirected himself in concluding that R3 was faced with an ultimatum to resign or face termination. The option given to R3 was tri-faceted without any of the options drawing an inevitable conclusion of termination/dismissal. There was never a threat of termination/dismissal. Any assertion of threat was negated by R3's own reported assertion that her decision to resign was already emailed to the applicant even before the meeting on 18 February 2013. Thus, it could not be said that any statements during that meeting had cornered R3 into signing the resignation letter. R3 did not face termination even if she chose not to resign. It was on R3's own admission that she would not be able to perform her employment with consistent attendance that she opted to resign with the added benefits from the settlement. Her resignation was a valid resignation in settlement of the dispute between the parties (see paras 10, 15 & 31–35).

(3) One of the grounds on which the Minister found it fit to refer the matter to the Industrial Court was the fact the applicant never gave R3 warnings or the opportunity to show-cause. This was clearly a consideration of an irrelevant fact. There was no necessity for cautions or warnings. The risk of disciplinary action was not with regard to R3's misconducts before the

15 February 2013 meeting but with reference to probable future misconduct if she opted to continue in employment. No future misconducts were, however, committed since R3 opted to voluntarily resign from employment (see paras 8, 37–38).

(4) Another irrelevant fact considered by the Minister was that the resignation letter was drafted by the applicant and not by R3 herself. The mere fact the resignation letter was drafted by the applicant and not by R3 did not denote a threat or a situation that R3 was cornered into signing the letter under protest. The Minister failed to consider that R3 was given the weekend to consider the options and that was a factor that went to prove the voluntariness and validity of her resignation (see paras 44–47).

(5) In the face of the fact the parties had reached a mutual settlement, the Minister had misdirected himself in exercising his discretion against the objective, purpose and policy of the IRA by wrongly concluding there was a question of fact and law that R3's resignation was not voluntarily made to warrant reference to the Industrial Court. The contentions raised by R3 against the applicant's evidence of her tardiness and poor performance were made late in her case in her affidavits. She never raised them in any of her meetings with the applicant nor at the conciliatory meetings at the Industrial Relations Department. The evidential question raised by R3 in her affidavits was never raised before the Director-General of Industrial Relations ('DGIR'). Therefore, her contentions against the applicant's evidence could never be a fact or contention that was reported by the DGIR and, consequently, furnished to the Minister for consideration. Thus, such evidential question was irrelevant to the Minister's consideration as at the time of his exercise of discretion, this line of fact and contention was never brought before him (see paras 52–54 & 57).

(6) The Minister's averment that he had no knowledge of the salient facts which were repeatedly echoed in the applicant's information form and written representation and at the conciliatory meetings at the Industrial Relations Department, which facts formed the whole reason why R3 was given the tri-faceted option and that resulted in her resignation, was a gross indication the Minister had not appreciated the full factual matrix of the case and had misdirected himself in exercising his discretion to make the reference (see paras 39, 42–43).

[Bahasa Malaysia summary

Responden ketiga bekerja untuk pemohon sebagai guru sekolah bimbingan kanak-kanak. Akibat prestasi kerjanya yang lemah – khususnya kedatangan lewat ke tempat kerja, pulang kerja lebih awal dari waktu-waktu yang dijadualkan, tidak hadir tanpa alasan dan aduan daripada ibu bapa tentang

caranya menjaga anak-anak – pemohon bermesyuarat dengan responden ketiga pada 15 Februari 2013 (Jumaat) di mana responden ketiga diberitahu bahawa dia mempunyai pilihan untuk memperbaiki diri dan sambung bekerja dan mengambil risiko tindakan disiplin dikenakan terhadapnya jika berlaku lagi salah laku pada masa hadapan atau berhenti kerja secara sukarela dan mendapat faedah-faedahnya jika dia tidak boleh berjanji untuk menjalankan kewajipannya di bawah kontrak. Responden ketiga, yang pada ketika itu menjaga suaminya yang sakit, diberi masa mempertimbangkan pilihan-pilihan tersebut pada hujung minggu dan memberi keputusan pada hari Isnin berikutnya. Sebelum bermulanya mesyuarat pada 18 Februari 2013 lagi, responden ketiga memaklumkan pemohon bahawa dia telah menghantar emel menyatakan dia memutuskan untuk berhenti kerja serta-merta. Pada hari yang sama, pemohon menderaf satu surat berhenti kerja yang dibaca dan ditandatangani oleh responden ketiga. Dia dibayar gajinya hingga hujung bulan Mac 2013 dan dijanjikan dua tiket kelas bisnes sehala ke destinasi pilihannya. Sepuluh hari selepas dia menandatangani surat berhenti kerja tersebut, responden menulis kepada pemohon menyatakan bahawa dia telah dipecat; dia diberitahu bahawa jika dia tidak menandatangani surat berhenti kerja, perkhidmatannya akan ditamatkan. Responden ketiga memfailkan representasi-representasi kepada jabatan perhubungan perusahaan memohon pengembalian kedudukan jawatan asalnya dengan gaji dan faedah penuh. Selepas mesyuarat-mesyuarat berdamai diadakan di Jabatan Perhubungan Perusahaan di mana kedua-dua pihak berpeluang menyatakan kes masing-masing sepenuhnya, hal perkara tersebut dirujuk kepada responden pertama iaitu Menteri Sumber Manusia ('Menteri') yang, dalam penjalanan kuasa budi bicaranya di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('IRA') merujukkan representasi-representasi responden ketiga kepada Mahkamah Perusahaan bagi adjudikasi. Dalam permohonan semakan kehakiman ini, pemohon memohon perintah certiorari membatalkan rujukan Menteri dengan menghujahkan bahawa beliau tersalah arah dengan memutuskan sedemikian kerana beliau: (a) gagal mempertimbangkan fakta bahawa beliau mempertimbangkan hal perkara yang tidak patut dipertimbangkan; dan (b) gagal mempertimbangkan bahawa pemohon dan responden ketiga mempunyai penyelesaian bersama yang mana termasuk pemberhentian kerja secara sukarela dengan responden ketiga dan dengan itu, tiada pertikaian fakta atau undang-undang yang memerlukan adjudikasi Mahkamah Perusahaan.

Diputuskan, membatalkan rujukan responden pertama kepada Mahkamah Perusahaan:

(1) Bertimbun keterangan bahawa Menteri tidak mempertimbangkan fakta matrik kes dengan betul dan telah tersalah arah diri beliau dalam menjalankan kuasa apabila tidak mempertimbangkan fakta yang patut dipertimbangkannya dan sebaliknya. Beliau telah, dalam menghadapi

penyelesaian nyata, bercanggah dengan objek, tujuan dan polisi IRA dan gagal mempertimbangkan kedaulatan undang-undang dalam memutuskan kesahan pemberhentian kerja responden ketiga secara sukarela. Pemohon berjaya membuktikan bahawa Menteri telah melakukan kekhilafan undang-undang dalam keputusan beliau untuk merujuk representasi responden ketiga kepada Mahkamah Perusahaan (lihat perenggan 58–60).

(2) Menteri dalam afidavit balasan tersalah arah diri beliau dalam memutuskan bahawa responden ketiga berhadapan dengan kata dua sama ada berhenti atau dipecat. Pilihan yang diberi kepada responden ketiga bercabang tiga tanpa mana-mana pilihan yang membangkitkan kesimpulan pemecatan/penamatan perkhidmatan. Tiada ugutan pemecatan/penamatan perkhidmatan. Apa-apa hujahan ugutan dinafikan oleh hujahan responden ketiga yang dilaporkan bahawa keputusannya untuk berhenti kerja telah die-mel kepada pemohon sebelum mesyuarat pada 18 Februari 2013 lagi. Oleh itu, tidak boleh dikatakan bahawa apa-apa kenyataan semasa mesyuarat itu mendorong responden ketiga menandatangani surat berhenti kerja. Responden ketiga tidak berhadapan dengan pemecatan jika pun dia memilih untuk tidak berhenti kerja. Diperakui oleh responden ketiga sendiri bahawa dia tidak akan dapat melakukan kerja dengan kehadiran konsisten dan dengan itu dia memilih untuk berhenti kerja dengan faedah tambahan daripada penyelesaian. Pemberhentian kerjanya sah dengan penyelesaian yang dipertikaikan oleh pihak-pihak (lihat perenggan 10, 15 & 31–35).

(3) Salah satu asas yang mana Menteri berasa sesuai untuk merujukkan hal perkara tersebut kepada Mahkamah Perusahaan adalah fakta bahawa pemohon tidak pernah memberi responden ketiga amaran atau peluang untuk tunjuk sebab. Ini jelas satu pertimbangan fakta yang tidak relevan. Tiada keperluan peringatan atau amaran. Risiko tindakan disiplin bukan berkenaan salah laku responden ketiga sebelum mesyuarat 15 Februari 2013 tetapi merujuk pada kemungkinan salah laku masa hadapan sekiranya responden ketiga memilih untuk terus bekerja. Walau bagaimanapun, tiada salah laku masa hadapan yang dilakukan kerana responden ketiga memilih untuk berhenti kerja secara sukarela (lihat perenggan 8, 37–38).

(4) Satu lagi fakta tidak relevan yang dipertimbangkan oleh menteri adalah bahawa surat berhenti kerja dideraf oleh pemohon dan bukan responden ketiga sendiri. Fakta bahawa surat berhenti kerja dideraf oleh pemohon dan bukan responden ketiga semata-mata tidak bererti satu ugutan atau satu situasi di mana responden ketiga didorong untuk menandatangani surat di bawah protes. Menteri gagal mempertimbangkan bahawa responden ketiga diberi masa hingga hujung minggu untuk mempertimbangkan pilihan-pilihan dan faktor inilah yang

membuktikan kesukarelaan dan kesahan pemberhentian kerjanya (lihat perenggan 44–47).

(5) Berhadapan dengan fakta bahawa pihak-pihak telah mencapai penyelesaian bersama, Menteri tersalah arah diri beliau dalam menjalankan budi bicara yang bercanggah dengan objektif, tujuan dan polisi IRA dengan, secara salahnya, menyimpulkan bahawa wujud persoalan fakta dan undang-undang bahawa pemberhentian kerja responden ketiga bukan secara sukarela dan mewajarkan rujukan kepada Mahkamah Perusahaan. Hujahan-hujahan yang dibangkitkan oleh responden ketiga terhadap keterangan pemohon tentang kelewatan dan prestasinya yang lemah dibuat terkemudian dalam kesnya dalam afidavit. Dia tidak pernah membangkitkannya dalam mana-mana mesyuarat dengan pemohon mahu pun mesyuarat-mesyuarat perdamaian dengan Jabatan Perhubungan Perusahaan. Persoalan pembuktian yang dibangkitkan oleh responden ketiga dalam afidavitnya tidak pernah dikemukakan kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP'). Oleh itu, hujahan-hujahan terhadap keterangan pemohon tidak boleh menjadi fakta atau hujahan yang dilaporkan oleh KPPP dan, dengan itu, dikemukakan kepada Menteri untuk dipertimbangkan. Dengan itu, persoalan pembuktian tidak relevan dengan pertimbangan Menteri kerana pada masa penjalanan kuasa budi bicaranya, fakta dan hujahan ini tidak pernah dikemukakan kepadanya (lihat perenggan 52–54 & 57).

(6) Hujahan Menteri bahawa dia tiada pengetahuan tentang fakta nyata yang berulang kali dinyatakan dalam borang maklumat pemohon dan representasi bertulis dan ketika mesyuarat-mesyuarat perdamaian di Jabatan Perhubungan Perusahaan, yang fakta-faktanya membentuk keseluruhan sebab mengapa responden diberi pilihan bercabang tiga dan ini mengakibatkan pemberhentian kerjanya, adalah satu petanda kasar bahawa Menteri tidak mempertimbangkan dengan penuh fakta matrik kes dan tersalah arah diri beliau dalam menjalankan budi bicara beliau untuk membuat rujukan (lihat perenggan 39, 42–43).]

Notes

For cases on reference by Minister, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1905–1914.

Cases referred to

Abdullah Azizi Abd Hamid v Menteri Sumber Manusia & Anor [1997] MLJU 291; [1998] 2 CLJ 297, HC (folld)

Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal [2014] 6 MLJ 377, CA (refd)

Chan Soon Lee v YB Menteri Sumber Manusia Malaysia & Anor [1997] MLJU 196; [1998] 5 CLJ 133, HC (folld)

City-Link Express (M) Sdn Bhd v Greenson Dauk [2002] ILJU 5; [2002] 3 ILR 1219, IC (folld)
Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia Malaysia & ors [2007] 3 MLJ 1; [2007] 2 CLJ 97, FC (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204; [1988] 1 CLJ (Rep) 183, SC (folld)
National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189, FC (refd)
Starhill Golf Resort Berhad v Mahkamah Perusahaan Malaysia & Anor [2000] MLJU 544; [2000] 1 LNS 149, HC (folld)
Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor [1998] 7 MLJ 359; [1998] 1 LNS 258, HC (folld)

Legislation referred to

Industrial Relations Act 1967 s 20, 20(1)
Rules of Court 2012 O 53 r 3

Amardeep Singh (Lee Hishamuddin Allen & Gledhill) for the applicant.
Hani Haniza (State Legal Advisor) for the first respondent.
Anand Ponnudurai (Kamini with him) (Bodipalar Ponnudurai De Silva) for the third respondent.

Azimah Omar JC:

BACKGROUND FACTS

[1] This is an application by the applicant ('The British School of Kuala Lumpur Sdn Bhd') for judicial review pursuant to O 53 r 3 of the Rules of Court 2012 ('the ROC 2012'). The applicant has sought from this court, inter alia, for an order of certiorari and an order of prohibition against the first respondent, the Minister of Human Resources ('the Minister') in referring ('reference') the representation ('representation') made by the third respondent (Kateia Mohieeldin Mohammad Zaied) who is the ex-employee of the applicant ('employee') to the Industrial Court which is the second respondent for an Award or decision.

[2] Succinctly put, it is the applicant's case that the Minister had misdirected his discretion under s 20 of the Industrial Relations Act 1967 ('the Act') in making such reference regarding a representation which in essence allegedly is not a case fit to be referred to the Industrial Court.

[3] The applicant is a private co-educational international school which facilitates education based on the curriculum of England and Whales.

[4] The employee commenced her employment as a nursery teacher with the applicant on 15 August 2009 (see exh EVC1 of the applicant's affidavit in support ('AIS')).

[5] Thereafter, concerns and issues arose regarding the employee's alleged tardiness, absenteeism without notifying the applicant and also leaving work early in her performance under the employment contract. Evidence of which has been categorically appended in exh EVC1A of the applicant's affidavit in reply against the Minister's affidavit in reply (there are contentions made against these evidences by the employee very late in her case (in her affidavits in reply). This court shall delve into these contentions later in this judgment)

[6] Entailing her poor performance and absenteeism, a meeting was held late in 15 February 2013, the same day the employee was absent from work for the third time that week. One David Kirkham ('witness') was appointed to oversee and witness the meeting without a single iota of protest by either of the parties. During the meeting, the employee was informed of the concerns, complaints and emails from parents who were concerned with their children's education due to the employee's absenteeism and tardiness. Thereafter, the employee was given a tri-faceted option with three options to choose from ('option').

The option is NOT an ultimatum leading to termination or resignation

[7] At this juncture, this court must highlight that the option is not a simple two choices ultimatum. A simple appreciation of the full extent of the factual matrix would reveal that the option was tri-faceted. The option at any material time is NOT an ultimatum of either resign or be terminated/dismissed. Distinctively, the tri-faceted option instead offers the following options, WITHOUT any of the options drawing an inevitable conclusion of termination/dismissal:

(a) shape up and continue with the employment; or

(b) risk disciplinary actions if the same poor performance during employment is continued after the meeting; or

(c) voluntarily resign with added benefits should the employee could not promise appropriate performance of her obligations under the employment contract.

Warnings and show-causes are irrelevant

[8] Furthermore, it must be highlighted here that the risk of disciplinary action is NOT with regard to the employee's past misconducts before the meeting, but instead the probable future continued misconduct should the

employee opts to continue with the employment. Thus, the question of proper warnings and show-causes is irrelevant in the present case as there are no future misconducts committed since the employee opted to voluntarily resign from her employment. The tri-faceted option has been reported in the following excerpt of the witness's report (see exh EVC5 of the AIS):

> Adam asked Katya how did she think she was coping with the demand of the job and her husband's current health situation, she said she was struggling but wanted to work. Adam explained to Katya that we were *happy for her to continue in work* but the current levels of absence ... looked very likely to increase given her current situation. There had been verbal concerns raised by some of her class parents ... and we received a letter from a concerned parent who ... voiced her concerns over the disruption to this continued absence was having on her daughter in the class.
>
> Adam spoke very calmly and explained to Katya that from an employer's point of view that *continued absences over and above the current allocation* ... would lead to disciplinary action ... He then showed her two examples of warnings that she could *expect* – failure to contact employer when absent and failure of duty of care.
>
> Adam *suggested* that if Katya wanted to look after her husband she *could resign and not lose any benefits* ... He said he could try to get her pay until the end of term, with all her benefits. This was offered only as an option.
>
> Katya asked for time to talk it over with her husband. Adam agreed. (Emphasis added.)

[9] After given time to consider the option, another meeting was held to discuss the employee's decision over the option given in the previous meeting with Adam and the witness. This meeting was conducted on the immediate weekday after the previous meeting, on 18 February 2013 attended by the witness, Emma Clearly ('Emma') and the employee. The employee informed that she has already emailed her decision to resign to Adam even before the meeting. The conduct of the meeting was reported in the witness's report dated 27 May 2013 (see exh EVC4 of the AIS) and also Emma's report of even date (see exh EVC5 of the AIS). Upon the employee's decision, Emma proceeded to draft the resignation letter which was later read and voluntarily signed by the employee.

Threat is irrelevant during the 18 February 2013 meeting

[10] It must be highlighted at this juncture that any averment of threat during this meeting is verily irrelevant as the decision to resign as per the terms agreed was reached by the employee even before the meeting itself vide the alleged email to Adam. Thus, it cannot be said that any statements during the meeting had cornered the employee in making her decision to sign the resignation letter.

[11] The terms of the voluntary resignation are as follows (see exh EVC3 of the AIS): A

(i) The employment will officially end on Monday 18th February 2013.

(ii) The employee will be paid in full up until the end of academic term 2, Wednesday 22nd March 2013. B

(iii) The employee will receive 2 business class one way flights to destination of choice.

[12] In compliance of the above resignation letter, the employee's salary was paid (up to even 31 March 2013) into the employee's husband's account on 26 March 2013, which was the usual payment arrangement between the applicant and the employee. C

[13] At this juncture, the overwhelming conclusion is already that there is a mutual settlement of the concerns between the applicant and the employee. D

[14] However, ten days after the voluntary resignation, the employee has issued a letter dated 28 February 2013 to the applicant alleging that she was instead dismissed from her employment (see exh EVC8 of the AIS): E

> I was further informed if I did not sign a particular document, I would be dismissed. Under these circumstances, I signed a document dated 18th February. This is to put on record that I consider the actions of the school as amounting to dismissal ...

F

There is no threat leading the employee to sign the resignation letter

[15] Again, the assertion of threat is negated by the employee's own reported assertion that her decision to resign was already emailed to Adam even before the meeting on 18 February 2013. G

[16] The employee proceeded to file a representation to the Industrial Relations Department. Following that representation the applicant and the employee were called for a conciliation meeting on 29 May 2013 vide a letter issued by the Industrial Relations Department (see exh EVC9 of the AIS). H

[17] Following the letter calling for the conciliation meeting, the applicant had duly furnished the Industrial Relations Department with the requisite employer's information form under s 20 of the Act. A simple scrutiny of this information form would show that the applicant has sufficiently furnished all the facts underlying the employee's voluntary resignation covering the whole extent of the following: I

(a) employee's tardiness, absenteeism and overall poor performance;

A

> The employee had often been late, absent without medical leave and without informing the School and leaving work early throughout her employment.
>
> Furthermore, the Employee failed to submit an Assessment of her class in July 2011 ...

B

(b) the first meeting on 15 February 2013 where the employee was given the tri-faceted option;

> The Employee was absent on Friday 15.2.2013. This was the 3rd time that week that she was absent ... At the said meeting ... If the Employee *continued being absent* without informing the School, the School would have no choice but to commence disciplinary proceedings. *The decision whether the Employee should resign or continue to work at the School with consistent attendance was left to the Employee ...*

C

D

(c) complaints and concerns of parents regarding employee's poor performance;

> The School had received e-mails from parents who voiced their concerns on the unsettling effect of the Employee's extended and unplanned absences on their child. Also, parents did e-mail the School as they were unhappy with the way the Employee handled their child concerning swimming lessons.

E

(d) the fact that the employee could not guarantee her consistent attendance to work;

> The School asked the Employee how she would cope with the demands of her job and her husband's ill health, as the School needed her to be consistent with her attendance at work. *The employee advised that she could not guarantee her consistent attendance at work.*

F

(e) the fact that the employee was given the whole weekend to consider the option; and

G

> The decision whether the Employee should resign or continue to work at the School with consistent attendance was left to the Employee to mull over the weekend.

H

(f) the fact that employee was not dismissed and advised of her own voluntary resignation on 18 February 2013:

> On 18.2.2013, the Employee advised the School that she had decided to resign from her employment with immediate effect.

I

[18] During the conciliation meeting, the applicant has made a full and sufficient statement of fact underlying the employee's voluntary resignation. During this meeting, there was never any contention against the evidence of the employee's poor performance. The only contention raised by the employee

was that she was forced to the sign the resignation letter and she asked to be re-instated to her former occupation as a nursery teacher with full salary and benefits.

[19] Another conciliation meeting was conducted on 5 June 2013 in which the applicant had furnished all the supporting documents and advised the industrial relations officer of its decision to not reinstate the employee (see exh EVC11 of the AIS for the letter and enclosed supporting documents).

[20] On 14 June 2013 the applicant proceeded to furnish a written representation to the Industrial Relations Department echoing the material facts and contemporaneous documents of its contention with a request that the same would be represented to the Minister to enable him to exercise his duty under the Act (see exh EVC12 of the AIS).

[21] The same representation was informed to have been forwarded to the Industrial Relations Department in Putrajaya vide a letter dated 28 June 2013 which was received by the applicant on 9 September 2013 (see exh EVC13 of the AIS).

[22] Entailing the above, the applicant was informed vide a letter dated 28 August 2013 from the Industrial Relations Department which was received by the applicant on 11 September 2013 that the Minister has decided to refer the employee's representation to the Industrial Court for adjudication.

[23] The applicant's case is against this reference. The applicant's case can be summarised in the following manner:

[24] The Minister had misdirected himself in inappropriately exercising his discretion under s 20 of the Act on the grounds that:

(a) the Minister had failed to properly appreciate the factual matrix of the case. In that the Minister had failed to consider facts which he ought to consider and had considered matters which ought not to consider; and

(b) the Minister had failed to identify that the case being a settlement vide a voluntary resignation to be a case unfit to be referred to the Industrial Court as it goes against the purpose and the policy of the Act itself.

[25] Now, it is plain to this court that the second ground of contention of the applicant can only be answered if the first ground of contention has been determined. Thus, this court shall first delve into the underlying facts of this case and identify if there were indeed any misdirection on the part of the Minister in exercising his discretion under s 20(1) of the Act in referring the representation to the Industrial Court for adjudication.

A HAVE THE MINISTER PROPERLY APPRECIATE THE FULL FACTUAL MATRIX OF THE CASE?

[26] There is little dispute on the underlying law and principle governing the Minister's duty to examine and appreciate the full facts of the representations and report he received from the Director General of Industrial Relations regarding the dispute and the conduct of the conciliation meetings.

[27] This court is guided by the High Court decision in *Chan Soon Lee v YB Menteri Sumber Manusia Malaysia & Anor* [1997] MLJU 196; [1998] 5 CLJ 133 at p 160:

> Just as a workman is entitled to the said protection, similarly the law recognises the right of an employer to dismiss his workman with just cause or excuse. The Minister when acting under s 20(3) of the Act has to see that these two distinct rights are safeguarded *based on the facts and material placed before him* in the notification made to him by the director-general under s 20(2) of the Act ... the role of the Minister is to ascertain *whether on the facts and material placed before him*, the representation raises serious questions of fact or of law calling for adjudication by the Industrial Court. (Emphasis added.)

[28] On the same principle, the employee in its submissions has referred to the Federal Court decision in *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia Malaysia & Ors* [2007] 3 MLJ 1; [2007] 2 CLJ 97:

> It meant that there should be an *objective examination of the factual matrix available before the Minister* in order to ascertain whether a reasonable person, in similar circumstances, would have arrived at the decision which the Minister had done. (Emphasis added.)

[29] It is also a proof of a misdirection of a Minister's discretion if it can be proven that he has either considered irrelevant facts or failed to consider relevant facts. This court is guided by the case referred by the employee herself in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; [1988] 1 CLJ (Rep) 183:

> ... the court can interfere with the Minister's decision if he ... has *taken into consideration matters which he ought not have taken into account or vice versa*; or has otherwise gone wrong in law. (Emphasis added.)

[30] The Minister in his submission adds that the Minister in exercising his discretion in referring a representation to the Industrial Court should only consider facts and matters which were furnished to him by the DGIR and not to external facts which were raised after his exercise of discretion.

The Minister fails to appreciate the fact that there was never a threat of dismissal vide an ultimate either to resign or be terminated or the Minister has wrongfully

considered the non-existent fact of an ultimatum or threat

[31] Against the vivid facts presented vide the applicant's information form and written representation the Minister surprisingly has misdirected himself in concluding a fact that the employee was faced with an ultimatum either to resign or face termination in para 14 of the Minister's affidavit in reply. This is by and large not at all the fact underlying the employee's voluntary resignation. It is reiterated here that the tri-faceted option instead offers the following options, WITHOUT any of the options drawing or risking an inevitable conclusion of termination/dismissal:

(a) shape up and continue with the employment; or

(b) risk disciplinary actions should the same poor performance during employment is *continued after the meeting*; or

(c) voluntarily resign with added benefits should the employee could not promise appropriate performance of her obligations under the employment contract.

[32] The option is immensely distinct from what was considered as fact by the Minister. The fact could not be more different. There was never a threat of termination/dismissal. In absence of such threat, it can never arise any allegation of forced resignation or termination. Essentially, the employee would NOT face termination even if she should choose not to resign.

The Minister is wrong in considering a misconceived fact that the settlement through resignation is instead a termination/dismissal

[33] It is on the employee's own admission to not being able to perform her employment with consistent attendance that the employee opted to resign with the added benefits from the settlement. Indeed there was a settlement here in which the employee would be able to make the best out of the given circumstances that she is not able to perform her obligations under her employment contract.

[34] Such resignation after being informed of poor performance is indeed a valid resignation. This court is guided by the case of *City-Link Express (M) Sdn Bhd v Greenson Dauk* [2002] ILJU 5; [2002] 3 ILR 1219:

> He may be told of his failure to perform satisfactorily and/or of his misconduct and warned that his future prospects in the employer's establishment are bleak if he does not shape up. The issue of resignation may well crop up. Where *an employee who had been told of the several respects in which he has failed to perform*, or to meet the standards of conduct expected of his employer, decides that it would be wise to make the best out of a bad situation and that it would be in his interest to resign *it would be amatter of some difficulty for the court to find that the claimant left the*

A *employer because he had been forced to tender his resignation. To do so would be to ignore the reality of workplace dynamics and interaction between employer and employee*. (Emphasis added.)

B **[35]** The above excerpt is verily similar and applicable to the present case. The employee was informed of her poor performance, and upon realisation that she could not perform her obligations the employee herself saw that it is much more desirable to tender her resignation. Indeed this resignation is a valid resignation in settlement of the parties' dispute.

C **[36]** Furthermore, the mere fact that the applicant is the employer of the employee does not raise a presumption of undue influence/pressure to vitiate the valid voluntary resignation. The court is guided by the High Court decision in *Starhill Golf Resort Berhad v Mahkamah Perusahaan Malaysia & Anor* [2000] MLJU 544; [2000] 1 LNS 149:

D

> There is no presumption of undue influence in an employer and employee relationship ...

E *The Minister is wrong in considering the absence of warnings or show-cause by the applicant*

[37] One of the grounds the Minister finds it fit to refer the representation to the Industrial Court was the fact that the applicant never gave warnings or
F opportunity to show-cause to the employee (see para 22(e) of the Minister's affidavit in reply)

[38] This clearly is an irrelevant fact to be considered. There's no necessity for cautions or warnings as of yet. The report of the meeting clearly shows that
G these disciplinary actions would only become relevant if the respondent should continue to be absent if she opted to continue employment from the option. Thus, the question of proper warnings and show-causes is irrelevant in the present case as there were no future absenteeism committed since the employee opted to voluntarily resign from her employment.

H

The Minister admits to not having knowledge of salient facts leading up to the employee's voluntary resignation

I **[39]** It is indeed alarming that the Minister himself would admit to having no knowledge of salient facts which were already furnished to the DGIR and to his office vide the employer's information form (exh EVC10 of the AIS) and the applicant's written representation (exh EVC1A of the applicant's affidavit in reply to the Minister's affidavit).

[40] The Minister had averred in para 12 of his affidavit in reply that he has no knowledge of the matters averred in paras 6 and 7 of the AIS. Paragraphs 6 and 7 reveals a succinct statement of salient facts which led to the resignation of the employee:

> 6. The 3rd Respondent had in the course of her employment often been late, absent without medical leave and without informing the Applicant and also leaving work early. This resulted in the Applicant having to make last minute arrangements for additional staff members to cover the 3rd Respondent's classroom until her arrival at work ...
>
> 7. The 3rd Respondent would also often ask to leave early in the afternoon ...

[41] Similarly, the Minister had averred and admitted in para 15 of his affidavit in reply to have no knowledge the salient facts set out in para 11 of the AIS. Paragraph 11 of the AIS sets out and exhibits proof of payment of salary as per the agreed terms of the employee's voluntary resignation (see EVC7 of the AIS).

[42] These were facts which were repeatedly echoed in the information form, applicant's written representation, and even on both of the conciliatory meetings held at the Industrial Relations Department. These facts largely culminate the whole reason the employee was given the tri-faceted option and also her voluntary resignation.

[43] The mere fact that the Minister would admit to not know or not have any knowledge of these facts is a gross indication that indeed the Minister had not appreciated the full factual matrix of the case and has misdirected his discretion in making the reference.

The Minister has wrongfully considered the fact that the resignation letter was drafted by the applicant

[44] The Minister has averred in para 14 of his affidavit in reply that he has considered the fact that the resignation letter was drafted by the applicant and not the employee herself.

[45] This is an irrelevant fact to be considered to determine the validity of the settlement vide the voluntary resignation of the employee. This court is guided by the High Court decision in *Starhill Golf Resort Berhad v Mahkamah Perusahaan Malaysia & Anor* [2000] MLJU 544; [2000] 1 LNS 149 where the court had held:

> In this regard, the First Respondent (at pages 28 to 30 of the Award) had only considered the assertion of the Second Respondent as his proof of his involuntary

resignation. *The First Respondent in arriving at this conclusion had incorrectly taken into consideration the following matters –*

(i) *the preparation of the resignation letter by the Applicant ...* (Emphasis added.)

[46] Thus, just the mere fact that the resignation letter was drafted by the applicant and not the employee does not denote a threat or a situation that the employee is cornered to sign the resignation letter under protest. Therefore, this further adds to the overwhelming conclusion that the settlement in the resignation letter indeed is a valid and voluntary resignation.

The Minister has failed to consider the fact that the employee was given two days to consider the option as a proof of voluntariness

[47] The Minister has considered an untrue fact that despite the two days afforded to the employee to consider the option, the employee was in a position cornered to resign or face termination. This fact is utterly untrue. Instead, the fact that the employee is given time to consider the option, is a factor proving the voluntariness and validity of a resignation. This court is guided by the case of *Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 7 MLJ 359; [1998] 1 LNS 258:

> *To make out a case that her resignation was not voluntary* and her resignation was obtained under undue influence, misrepresentation, fraud or the like, *the employee has to establish that he was not allowed time to think over the matter ...* (Emphasis added.)
>
> See also *Omron Electronics Sales and Services Sdn Bhd v Phoon Wai Kit & Anor* [2010] 7 CLJ 372.

HAS THE MINISTER MISDIRECTED HIS DISCRETION IN CONTRADICTING THE PURPOSE, OBJECT AND THE POLICY OF THE ACT ITSELF?

The Minister has not exercised his discretion in promoting the purpose and policy for industrial harmony and settlement prescribed under the act

[48] The preamble of the Act stipulates the overriding policy, object and purpose of the Act to be:

> An act to *promote and maintain industrial harm*ony and to provide for the regulation of the relations between employers and workmen and their trade unions and the *prevention and settlement* of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom. (Emphasis added.)

[49] Precedents have even decided that the Minister must exercise his discretion in promoting such settlement of dispute. This court is guided by the Federal Court decision in *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189 at p 191:

> Thus we must construe the Industrial Relations Act 1967, to determine its policy and object. *It cannot be gainsaid that the intention of the Act is to regulate the relations between management and labour and to prevent and settle trade disputes arising therefrom.* (Emphasis added.)

[50] Furthermore, the Court of Appeal has also held in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 61:

> Put simply, the first question which the Minister ought to ask himself is *whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at …* (Emphasis added.)

[51] In fact, the Court of Appeal has recently decided in *Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377 that:

> [31] More to the point at hand, we have judicial pronouncements which *make it clear that the Minister's exercise of discretion or administrative powers under the provisions of the IR Act must always be within the objectives of the legislation* and the scope of his statutory responsibilities. (Emphasis added.)

[52] Thus, upon the authorities above, it is clear that the Minister, in the face of the fact that the parties have reached to a mutual settlement of the dispute (in concluding and agreeing to the terms of the voluntary resignation) because of the employee's own admitted inability to guarantee proper performance of her employment, has misdirected himself in exercising his discretion against the objective, purpose and policy of the Act when he wrongfully concluded the fact that there is a question of fact and law that the resignation might be forced into or executed by the employee in protest.

[53] Again, the employee was never under any threat of termination although if she opted to not resign. She even has the option to continue her employment save that she is able to perform her employment appropriately. Therefore, there never arose, any facts to indicate that there might be a question of fact or law that the resignation is involuntarily made to warrant reference to the Industrial Court. Vitiating such mutually agreed settlement of dispute would directly contradict the policy of the Act.

There is no question of fact or law in the evidence of the employee's misconducts and poor performance

[54] Now, although the employee has raised contentions against the applicant's evidence of her tardiness and poor performance, it must be noted that these contentions were only made late in the employee's case. In that it was only raised in the employee's affidavits but was never raised by the employee in any of the meetings at the school and also the conciliatory meetings at the Industrial Relations Department.

[55] The reports (exhibited and forwarded to the Industrial Relations Department by the applicant) reveal that the employee has never raised an inkling of protest against the allegation of tardiness and absenteeism during the meetings conducted on 15 February 2013 and 18 February 2013.

[56] In fact, the employee in her first affidavit in reply to the AIS has not averred any contention against the evidence led by the applicant on her tardiness and misconduct during the conciliatory meetings on 29 May 2013 and 5 June 2013 in answering the applicant's AIS particularly on the facts of the conciliatory meetings in paras 13–16 of the AIS (see para 9 of the employee's first affidavit in reply dated 9 August 2014 for the employee's reply to the applicant's averments regarding the conciliatory meetings).

[57] Thus, it is safe to infer that the evidential question raised by the employee in her affidavits was a question which was never raised before the DGIR. Therefore, the employee's contention on the evidence led by the applicant could never be a fact and/or contention which were reported by the DGIR and consequently furnished to the Minister for consideration. Thus, such evidential question is irrelevant to the consideration of the Minister as at the time of his exercise of his discretion, this line of fact and contention was never brought before him. Therefore, the employee's contention here cannot be considered by the Minister as a question of fact or law to warrant reference to the Industrial Court. This court is guided by a case which was referred by the Minister in his submissions which is the case of *Abdullah Azizi Abd Hamid v Menteri Sumber Manusia & Anor* [1997] MLJU 291; [1998] 2 CLJ 297 at pp 301–302:

> He relies purely on the notification made to him by the Director General under sub-s (2) ... With the notification he would have before him naturally the report of the proceedings including whatever evidence both oral and documentary presented therein. Upon all these matters placed before him, the Minister would make a study and decide as to whether the representation is frivolous or vexatious. *He is not allowed to consider other irrelevant matters not placed before him by the Director General. That being the case, what took place before the Director General during conciliation proceedings is crucial.* (Emphasis added.)

THE COURT'S FINDINGS

[58] In light of all the deliberations above, it is this court's findings that there are overwhelming evidences that the Minister has misdirected himself in exercising his discretion, in that he has not considered facts which he ought to consider and vice versa, he has in the face of a clear settlement has contradicted the object, purpose and policy of the Act and has failed to apply proper rules of law in determining the validity of the employee's voluntary resignation.

[59] It must be minded here that although the Minister has averred in his affidavit has simply averred that he has considered all the facts brought forth to him from the DGIR, it is not necessarily sufficient to prove he has considered the full factual matrix of the case. Especially in circumstances (alike in the present case) where there are overwhelming evidences that the Minister has not properly appreciated the factual matrix of the case.

THE COURT'S DECISION AND DIRECTIONS

[60] In light of all of the above findings, it is this court's decision that the applicant has successfully proven to this court that the Minister had had in fact committed errors of law in arriving to his decision to refer the third respondent's representation to the Industrial Court. Hence, this court hereby grants the following relief:

(a) an order of certiorari to quash the Minister's reference dated 28 August 2013

On the issue of costs

[61] The parties have agreed to an agreed costs of RM5,000. This court hereby orders the respondents do pay the applicant sum of RM5,000 in costs.

First respondent's reference to Industrial Court quashed.

Reported by Ashok Kumar